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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000387-001 DT 08/19/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
H. Beal
Deputy

STATE OF ARIZONA

PAUL WARNER HAWKINS

v.

PAUL DANIEL KUCERA (001)

JOHN P TATZ

MESA MUNICIPAL COURT
REMAND DESK-LCA-CCC
HON J MATIAS TAFOYA
PRESIDING JUDGE
MESA MUNICIPAL COURT
250 E 1ST AVENUE
MESA AZ 85210-1442
PAUL THOMAS
COURT ADMINISTRATOR
MESA MUNICIPAL COURT
250 E 1ST AVENUE
MESA AZ 85210-1442

RECORD APPEAL RULING / REMAND

Lower Court Case No. 2008–042126

Defendant Appellant Paul Daniel Kucera (Defendant) was convicted in the Mesa Municipal Court of DUI and extreme DUI. Defendant contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On June 5, 2008, Defendant was charged with violating A.R.S. § 28–1381 (A) (1) for driving while under the influence of intoxicating substances; A.R.S. § 28–1381 (A) (2) for driving with a blood alcohol in excess of 0.8; and for driving with a blood alcohol—BAC—of .18 or more, a violation of .A.R.S. § 28–1382 (A). Defendant stipulated that his blood was properly drawn and he had a BAC of .234.

The charge resulted after a hit and run accident at the Food City parking lot involving a truck matching the description of the truck Defendant commonly drove. At trial on December 16,

2010,[1] the victim—Norma Perez—testified. She stated she was entering Food City when she heard the collision with her truck.[2] She said she was "banging on the window to try to get him to stop"[3] and saw the hit and run driver leave the premises.[4] Ms. Perez looked at her truck and determined there was a scratch on the truck. She stated: "And we just got out and looked."[5]A gentleman who observed the accident gave the victim the license plate number for the hit and run driver's automobile.[6] The victim used her cell phone[7] and called the police at 8:47 P.M.[8] and the officer—Justin Cherry—was dispatched at 8:48.[9] The officer ran the license plate number[10] and determined the owner of the vehicle lived at 1635 W. Sixth Drive.[11] The officer also obtained a description of the vehicle from the computer.

Officer Cherry was the officer called to the scene. He testified about a security motion sensor light in front of the home. He said it turned off as he got out of his car.[12] He stated the light turned back on as he approached the home.[13] He later timed the light and determined it lasted for approximately 75 seconds.[14] In less than a minute after Officer Cherry knocked on the door, Defendant came to talk with him.[15] Originally, Officer Cherry stated there was some indication Defendant had been drinking in the short time he had been home[16] but the officer later clarified his statement and said Defendant had nothing in his hands and there were no signs Defendant had been drinking since he got home.[17] Officer Cherry also estimated Defendant was home for two minutes before he arrived.[18] Officer Cherry reported Defendant denied drinking[19] but stated he did have some cough syrup.[20] Defendant did not consume any alcohol while in the presence of the police officer. Defendant was later identified as the driver in the Food City incident.

. . . .

[1] Trial transcript of December 16, 2010, jury trial.
[2] *Id*. at p. 5, l. 25; p. 6, l. 1.
[3] *Id*. at p. 6, ll. 9–11.
[4] *Id*. at p. 7, ll. 1–2.
[5] *Id*. at p. 8, ll. 23–25.
[6] *Id*. at p. 9, ll. 23–25; p. 10, ll. 1–6; p. 11, ll. 1–5.
[7] *Id*. at p. 7, l. 11.
[8] *Id*. at p. 21, ll. 4–6.
[9] *Id*. at p. 12, l. 24.
[10] *Id*. at p. 13, ll. 24–25.
[11] *Id*. at p. 14, ll. 2–3.
[12] *Id*. at p. 14, ll. 21–23.
[13] *Id*. at p. 15, l. 1.
[14] *Id*. at p. 15, ll. 22–25.
[15] *Id*. at p. 16, ll. 6–7.
[16] *Id*. at p. 16, ll. 12–14.
[17] *Id*. at p. 16, ll. 17–19.
[18] *Id*. at p. 22, ll. 1–4.
[19] *Id*. at p. 16, ll. 23–24; p. 22, ll. 18–22; p. 34, ll. 24–25; p. 35, ll. 1.
[20] *Id*. at p. 35, ll. 13–15.

Defendant had the following indicia of alcohol consumption: (1) bloodshot watery eyes; (2) odor of alcohol; (3) poor balance; (4) profuse sweating;[21] and (5) flushed face.[22] Officer Jack Broadhurst was called to handle the alcohol investigation. This police officer observed all six HGN cues[23] and testified Defendant denied consuming alcohol.[24] Officer Broadhurst also stated Defendant said he could not stand. After arresting Defendant the police drew Defendant's blood. The BAC was .234. Officer Broadhurst testified he noticed the odor of alcohol increased over time[25] but agreed the increase may have been the result of being inside an enclosed building.[26] When questioned, Officer Broadhurst stated profuse sweating is not normally a sign of someone under the influence of alcohol.[27] He further stated Defendant told him he had high blood pressure and had been sick recently.[28] The officer also testified he obtained Defendant's weight—300 pounds—during the course of his investigation.

At trial, Lela Fokumlah—a toxicology expert—testified about the amount of alcohol a 300 pound male would need to consume to have a BAC of .234. She stated it would take at least 18 standard drinks to arrive at that concentration.[29] She further said it is possible for a person to drink 18 shots within a four minute period,[30] but added that many people would vomit if they were "trying to pound shots really quickly."[31]

Defendant testified and stated he was ill on the day he was cited for the DUI and extreme DUI. He stated he "got a quart of Jim Beam."[32] After returning from Food City, Defendant "grabbed a big butt belly buster" and "poured over half that bottle down.[33] At trial, Defendant admitted he drank alcohol that day[34] despite having told the police he had not had any alcohol when they investigated and then arrested him. He also testified he had been home between five and ten minutes[35] when the police first arrived. He then explained he was home for approximately 10 minutes. He stated he lied[36] to the police about drinking alcohol because he did not want his mother to know.[37] Defendant testified he took approximately three minutes to drink the

[21] *Id*. at p. 17, ll. 1–4.
[22] *Id*. at p. 26, ll. 2–12.
[23] *Id*. at p. 31, l. 5.
[24] *Id*. at p. 26, ll. 23–25; p. 27, l. 1.
[25] *Id*. at p. 36, ll. 17–25.
[26] *Id*. at p. 39, l. 3–10.
[27] *Id*. at p. 38, ll. 6-9.
[28] *Id*. at p. 38, ll. 6–14.
[29] *Id*. at p. 44, ll. 5–11; p. 45, ll. 7–25; p. 45, ll. 1–3.
[30] *Id*. at p. 51, l. 16.
[31] *Id.* at p. 51, ll. 3–6.
[32] *Id*. at p. 65, ll. 24–25.
[33] *Id*. at p. 69, ll. 21–25.
[34] *Id*. at p. 71, ll. 2–4.
[35] *Id*. at p. 71, ll. 16–23.
[36] *Id*. at p. 74, ll. 7–18.
[37] *Id*. at p. 72, ll. 20–25.

alcohol[38] and that he had approximately 10 minutes from the time he left the store until the police appeared.[39]

The State concurred with Defendant's description of the relevant events. At the end of the State's case-in-chief, Defendant raised a Rule 20 Ariz. R. Crim. P. Motion for acquittal claiming the State failed to demonstrate Defendant consumed the alcohol either before or while driving. The trial court denied Defendant's motion. Defendant was convicted of the charged offenses and. filed a timely appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES: DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S RULE 20 MOTION FOR ACQUITTAL.

Defendant claims the trial court erred in denying his Rule 20 Motion for Acquittal. In reviewing a denial of a Rule 20 Motion, this Court must consider the evidence in the light most favorable to sustaining the trial court's decision. *State v. Sullivan*, 205 Ariz. 285, 287, 69 P.3d 1006, 1008 (Ct. App. 2003); *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989).

Defendant's Rule 20 Motion is premised on the State's failure to prove all elements of the offenses beyond a reasonable doubt. A.R.S. §§28–1381 and 1382 share a common element which requires the alcohol concentration result from alcohol consumed either before or while driving. Defendant contends the State failed to prove beyond a reasonable doubt that he consumed alcohol either before driving or while driving. In support of this position, Defendant asserts he was not arrested at the scene of the accident. Some period of time elapsed between Defendant hitting victim's truck and the time when the police appeared at Defendant's home.

The time line for this offense was a critical element in determining if Defendant was drinking either before or while driving. The State alleged only a short period of time—a maximum of three minutes—elapsed between the collision and police contact with Defendant. The State's witnesses testified the police received the phone call at 8:48 P.M. and were at Defendant's home by 8:50 P.M. The State asserts Defendant did not have the needed time[40] to consume sufficient alcohol to result in a BAC of .234 unless he had been drinking prior to arriving at his home.

In analyzing the time line, this Court reviewed the actions taken by the parties. Thus, the police needed to (1) first receive the telephone call; (2) arrive at the scene; (3) receive information about the license plate for the car; (4) drive to the indicated residence; (5) ring the bell and contact Defendant's mother; and (6) contact Defendant. At a minimum, at least 2–3 minutes passed for all of the actions to occur. Assuming all of the State's evidence is correct—an assumption this Court must make—Defendant had at least three minutes from the time the victim first called the police at 8:47 P.M. and the time when the police officer met with Defendant at 8:50 P.M. The

[38] *Id*. at p. 79, ll. 16–25.
[39] *Id*. at p. 84, ll. 6–10.
[40] After the trial court denied Defendant's Rule 20 Motion, Defendant testified and posited he had between five and 10 minutes after the collision. He stated he purchased the alcohol and after the crash he immediately went home and belted approximately one-half quart of Jim Beam before taking cough medicine and going to bed.

victim, however, needed to (1) look at her vehicle for damage; (2) obtain the license plate from the observer; and (3) place the call to the police. The trial court had no evidence about the amount of time it took for the victim to check out her truck, speak with the observer, locate her cell phone, and place the phone call. The police officer did express his opinion—based on the time of the light at Defendant's home—that Defendant had only been home for about 75 seconds before the police officer arrived.

Officer Cherry did not note any signs of alcohol consumption at the home. He did not see Defendant drink. However, the officer never entered the home and never checked for evidence showing if Defendant had been drinking alcohol at the home. The police officer reported that Defendant denied drinking at the home or anytime.[41]

At trial, Ms. Fokumlah—the toxicology expert—testified about the amount of alcohol a 300 pound person would need to consume in order to have a BAC reading of .234. She stated it hypothetically was possible for a person to consume that amount of liquor—18 shots—in a four minute time period—a time period possibly available to Defendant. However, Ms. Fokumlah also stated that consuming a great amount of alcohol in a relatively short time could cause many people to vomit.

The trial court needed to assess the evidence and determine if the approximate four minute period provided sufficient time for Defendant to ingest enough alcohol to manifest the DUI symptoms he showed. If the Defendant did not have enough time to ingest a sufficient quantity of alcohol after the collision, it would be reasonable to infer he had ingested it before or during the time he was driving prior to the accident. If Defendant had enough time to ingest the amount of alcohol needed to show the DUI symptoms he manifested, the State would not be able to show beyond a reasonable doubt that Defendant had ingested the alcohol either while driving or before driving.

A Rule 20 Motion for Acquittal must be denied if reasonable minds could differ about the inference to be drawn from the evidence. *State v. Sullivan, id*., 205 Ariz. at 287, 69 P. 3d at 1008, ¶ 6. In this case, reasonable minds could differ about whether Defendant was drinking before the truck crash or only after the truck crash. The State's expert opined that while it is hypothetically possible to consume enough liquor in the maximum time Defendant had available—approximately 18 drinks in this instance—many people would vomit if they tried to drink the amount needed to become as drunk as Defendant was. Additionally, at the time the police officer met Defendant, he was also presenting with a variety of DUI cues—HGN cues, watery eyes, odor of alcohol, unsteadiness, slurred speech—and Defendant's system arguably would not have had the time to absorb enough alcohol in the few minutes between Defendant arriving home and the police officer arriving at the home. DUI may be proven by circumstantial evidence and the law "makes no distinction between circumstantial and direct evidence." *State ex rel O'Neill v. Brown*,

[41] At trial, Defendant later admitted he lied to the police when he said he was not drinking. At the time the trial court ruled on the Rule 20, the trial court was not aware of Defendant's admission that he had lied to the police.

182 Ariz. 525, 527, 898 P.2d 474, 476 (1995); *State v. West*, 226 Ariz. 559, ___, 250 P.3d 1188, 1191 ¶15 (2011).

The trial court's responsibility on a Rule 20 Motion is to determine if there was sufficient evidence to establish the State's case beyond a reasonable doubt. If substantial evidence exists, the court does not enter a Motion for Acquittal. Substantial evidence is more "than a mere scintilla" *State v. Nunez*, 167 Ariz. 272, 278, 806 P.2d 861, 867 (1991) and is proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). In determining if the trial court erred, the appellate court reviews the Rule 20 motion based on the entire record, including any evidence the defendant supplied. *State v. Nunez*, *id*, 167 Ariz. at 279, 806 P.2d 861. The appellate court conducts a de novo review of the trial court's decision and must view the evidence in the light most favorable to sustaining the verdict. *State v. West*, *id.*, 226 Ariz. at ___, 250 P.3d at 1191¶ 16. When viewed in the light of sustaining the verdict, this Court finds the State met its burden of showing sufficient evidence existed for a reasonable person to believe Defendant ingested alcohol prior to arriving home. The State presented evidence of the (1) time line involved resulting in a maximum of 4 minutes; (2) the amount of alcohol a person with a similar body shape to Defendant would need to consume—18 drinks; (3) Defendant's cues showing alcohol had already been absorbed into his blood stream; and (4) Defendant's denial about having consumed alcohol. Later Defendant admitted lying to the police, which further cast doubt on his credibility.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Mesa Municipal Court did not err when it denied Defendant's Rule 20 Motion.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Mesa Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Mesa Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

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THE HON. MYRA HARRIS
JUDICIAL OFFICER OF THE SUPERIOR COURT 082220110730